MOHD HANIF KASSIM v. PP AND ANOTHER APPEAL

HIGH COURT MALAYA, ALOR SETAR
CHOO KAH SING JC
[CRIMINAL APPEALS NO: 42S-08-05-2014 & 41S-08-05-2014]
19 JANUARY 2015

CRIMINAL PROCEDURE: *Charge – Framing or particulars of – Failure to state exact time and date offence committed – Whether time, date or place constitute essential ingredient of offence – Whether vitiated validity of charge – Whether fundamental right of accused to defend case was prejudiced – Whether charge valid – Criminal Procedure Code, s. 153*

CRIMINAL PROCEDURE: *Sentence – Principles of sentencing – Offence of rape – Subsequent negative effect on victim – Child born as a result of rape – Aggravating factor – Whether considered by trial judge in passing sentence – Whether sentence ought to be enhanced – Penal Code, s. 376(1)*

EVIDENCE: *Expert evidence – Competency of witness – DNA profiling report prepared by scientific officer – Whether qualified person under s. 399 of Criminal Procedure Code – Whether credence of DNA profiling discredited*

The accused was convicted for the offence of rape punishable under s. 376(1) of the Penal Code and was sentenced to eight years imprisonment by the Sessions Court Judge ('SCJ'). The victim, who was 14 years and 7 months of age at the time of the incident, told the court that, on or around the end of June 2010, the accused had forced himself on the victim and sexual intercourse took place in an oil palm plantation. Thereafter, the accused sent the victim home and told her not to tell anyone. Several months later, the victim gave birth to a baby boy. The accused was subsequently arrested. The result of a DNA profiling test revealed that the accused was the biological father of the baby boy and the probability of paternity was 99.9999% as calculated based on the Malaysian Malay population database. At the end of the prosecution case, the SCJ found that the prosecution had established a *prima facie* case against the accused and the accused was called to enter his defence. In his defence, the accused denied raping the victim and disagreed with the contents of the DNA report on the basis that it was not prepared by a chemist officer within the meaning of s. 399 of the Criminal Procedure Code ('CPC'). Dissatisfied with the decision of the SCJ, the accused appealed. On the other hand, the prosecution was not satisfied with the sentence imposed on the accused and filed a cross-appeal seeking a heavier sentence. The grounds of appeal raised by the accused were: (i) the charge was defective because it did not state the exact time and date the offence was committed, thereby prejudiced the accused of his right to raise a defence of alibi; and (ii) the scientific officer was not a qualified person to prepare the DNA profiling report.

Held (dismissing appeal by accused; allowing cross appeal by Prosecution):

(1) A badly drafted charge deprives an accused of his fundamental right to raise or prepare his defence. This is more so when the exact time or date and place are essential ingredients of the offence charged. However, in cases where the time, date or place does not constitute an essential ingredient of the offence, mere non-compliance with s. 153 of the CPC on the time, date or place will not vitiate the validity of the charge. (para 14)

(2) In the instant case, the exact time or date in the offence charged was not an essential ingredient in order to find conviction against the accused. However, if the age of the victim at the time or date of the commission of the offence is in question, then, it would be relevant to state the exact time or date the offence was alleged to have been committed. The wordings in the present charge were clearly stated. Although the exact time or date for the commission of the offence charged was not stated, the fundamental rights of the accused to defend the case against him was not prejudiced or derogated. The charge was therefore not defective. (paras 17, 18 & 21)

(3) A scientific officer is a qualified person under s. 399 of the CPC (*Shahrizal Abdul Ghani v. PP*) and the SCJ was correct in holding that P8 was a qualified person under s. 399 of the CPC. (paras 22 & 23)

(4) The ingredients of the offence had been proven by the prosecution beyond reasonable doubt. The credence of the DNA profiling report was not discredited. The DNA profiling report supported the fact that the accused was the paternal parent of the baby boy, in other words, it surmised sexual intercourse took place between the accused and the victim. (para 25)

(5) Rape is a serious offence, and one of the main reasons custodial sentence is imposed on a rape case is to protect the women. Special attention has to be given to the subsequent negative effect on the victim. A change in physical and emotion or mental suffering of the victim or even spiritual distress of the victim has to be considered by the court as this could be an aggravating factor to be taken into account in passing sentence. A negative effect on the victim's emotion or mental suffering need not necessarily take effect immediately; it can befall the victim at a later time. In the instant case, a child was born as a result of the rape, the victim and her family had to bear the burden to bring up the child. The victim could suffer emotional distress as she was still very young and not married. (para 36)

(6) The SCJ did not take into account the subsequent negative effect of the offence on the victim as well as the fact that a baby was born as a result of the wrongful act of the accused. The SCJ had given too much weight to the interests of the accused and as a result, the sentence imposed on the accused was inadequate and was not the appropriate sentence. Therefore, the sentence of eight years imprisonment was set aside and substituted with sentence of ten years imprisonment and one stroke of whipping. (para 44)

Case(s) referred to:
Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC ***(refd)***
Che Mohd Sufian @ Che Bastian Che Rashid v. PP [2014] 1 LNS 417 HC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP & Another Appeal [2004] 3 CLJ 737 FC ***(refd)***
Hairani Sulong v. PP [1993] 2 CLJ 79 HC ***(refd)***
Ho Ming Siang v. PP [1966] 1 LNS 68 FC ***(refd)***
Law Kiat Lang v. PP [1965] 1 LNS 81 FC ***(refd)***
Nelson Gnanaregasam v. PP [2010] 3 CLJ 561 CA ***(refd)***
Nor Afizal Azizan v. PP [2012] 6 CLJ 370 CA ***(refd)***
PP v. Azmadi Aznan Dumin [2012] 1 LNS 9 HC ***(refd)***
PP v. Chettuvelu Nani [2007] 9 CLJ 533 HC ***(refd)***
PP lwn. Ismail Ali [2009] 8 CLJ 46 HC ***(refd)***
PP v. Ismar Nor Tuah [2014] AMEJ 0416 ***(refd)***
PP v. Mohammad Arfah Jasmi [2008] 7 CLJ 836 HC ***(refd)***
PP v. Mohammad Zhahirin Yusof [2014] 1 LNS 84 HC ***(refd)***
PP v. Munawar Haris [2009] 9 CLJ 48 HC ***(refd)***
PP v. Yap Kok Meng [1974] 1 LNS 127 HC ***(refd)***
PP v. Zainuddin Adam [2012] 1 LNS 543 HC ***(refd)***
R v. Billam [1986] 1 All ER 985 ***(refd)***
R v. Roberts [1982] 1 All ER 609 ***(refd)***
R v. Severo Dossi [1918] 13 Cr App R 158 ***(refd)***
Shabir Rashid v. The State [1969] Cri LJ 1282 (Del) ***(refd)***
Shahrizal Abdul Ghani v. PP [2014] 1 CLJ 70 CA ***(refd)***
State of Kerala v. K Govindan Cri LJ 818 (Ker) ***(refd)***
Zulkifli Md Rodzi v. PP [2013] 4 CLJ 250 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 153(1), 399
Penal Code, ss. 375, 376(1), (2)

[Criminal Appeal No: 42S-08-05-2014]
For the appellant - Che Sharif Matt; M/s Taulan Rasul & Co
For the respondent - Sharifah Syazwani Syed Hussin; DPP

[Criminal Appeal No: 41S-08-05-2014]
For the appellant - Sharifah Syazwani Syed Hussin; DPP
For the respondent - Che Sharif Matt; M/s Taulan Rasul & Co

Reported by S Barathi

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JUDGMENT

Choo Kah Sing JC:

Introduction

[1] Mohd Hanif B Kassim (the accused) filed an appeal against the B decision of the Sessions Court Judge dated 4 May 2014. The accused was convicted for the offence of rape punishable under s. 376(1) of the Penal Code, and he was sentenced to eight years imprisonment. The prosecution was not satisfied with the sentence imposed on the accused by the learned judge and had filed a cross-appeal to this court and sought a heavier sentence C to be imposed on the accused.

[2] On 19 January 2015, this court dismissed the accused's appeal and allowed the prosecution's cross-appeal against sentence from the decision of the Sessions Court. This court substituted the Sessions Court's sentence of eight years imprisonment with ten years imprisonment and one stroke of D whipping. Below are the reasons for the decision.

The Salient Facts

[3] The charge against the accused is as follows:

> Bahawa kamu pada 20hb Jun 2010 hingga 28hb Jun 2010, jam lebih kurang E 2.00 pagi hingga 4.00 pagi, di ladang kelapa sawit Harvard, Bedong di dalam daerah Kuala Muda, di dalam Negeri Kedah telah merogol xxx KP: xxx yang berumur 14 tahun 7 bulan. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 376(1) Kanun Keseksaan.

F **[4]** The prosecution had called eight witnesses in the trial, and the main evidence of the prosecution's case came from SP6, the victim, and SP8, the science officer.

[5] On or around end of June 2010, around 2.00 am, the accused and the victim (SP6) went to an oil palm plantation in Bedong, Kedah. They stopped G near a temple (tokong) at the plantation and sat next to a palm tree. The victim told the court that the accused held her hand and took off his pants. The victim also told the court that she warded off the accused's hand. However, the accused forced the victim to remove her panties. Later, the accused forced himself on the victim and sexual intercourse took place, H which lasted approximately five minutes, according to the victim's evidence. The victim had described in examination-in-chief that she saw and felt the accused's private part penetrated into her vagina (see p. 69 appeal records). Later, the accused sent the victim home and told her not to tell anyone. At the time of the incident the victim was 14 years and 7 months of age. This I fact was not disputed. Several months later, the victim's appearance seemed abnormal for her age. The victim's mother (SP1) took her to a clinic and

discovered that the victim was 34 weeks into her pregnancy. The victim gave birth to a baby boy on 28 March 2011. The accused was arrested on 24 February 2011.

[6] A DNA profiling test was conducted by one scientific officer, Asfarina Bte Jamal Mohideen (SP8), from the Department of Chemistry, Malaysia. The object of the DNA test was to verify the genetic locus of the baby boy, the victim and the accused. SP8 explained in court that the result of the DNA profiling report (P8) revealed that the accused was the biological father of the baby boy, and the probability of paternity was 99.9999% as calculated based on the Malaysian Malay population database (see p. 124 of appeal records).

[7] At the end of prosecution case, the learned judge found the prosecution had established a *prima facie* case against the accused and the accused was called to enter his defence.

The Defence

[8] The accused gave evidence under oath. He denied having been to the place of incident and did not know what was the date he was being charged. He told the court that he knew the victim only as a friend and cannot remember how many times they had gone out together. He denied raping the victim. He disagreed with the content of the DNA report (P8) on the basis that it was not prepared by a chemist officer, but by a scientific officer who was not a qualified person within the meaning of s. 399 of the Criminal Procedure Code (CPC); other than that, the accused did not adduce any evidence to challenge the contents of the DNA report (see p. 92 of the appeal records).

The Court Findings

[9] The learned defence counsel urged the court to consider several grounds of appeal. There are two grounds which warrant consideration. The first is that the charge was defective because it did not state the exact time and date the offence was committed, thereby it has prejudiced the accused's right to raise a defence of alibi. The second is that the scientific officer was not a qualified person to prepare the DNA profiling report.

The Time Of Committing The Offence In A Charge

[10] Section 153(1) of the Criminal Procedure Code (CPC) states:

> The charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged.

[11] The learned defence counsel referred to s. 153(1) of the CPC and relied on the case of *PP v. Yap Kok Meng* [1974] 1 LNS 127 and urged the court to consider that the charge in the instant case has failed to disclose sufficient particular of the time, and therefore, the charge was defective for non-compliance with s. 153(1) of the CPC.

[12] It is observed that the relevant part in the charge in the case of *Yap Kok Meng* reads as follows:

> That you between 27 September 1972 at about 6.30 p.m. and 8.05 a.m. 22 December 1972 at Batu 14 Kuala Lumpur-Ipoh Road, Rawang ...

[13] His Lordship Hashim Yeop Sani J commented that those words were unclear and could be construed in various ways and to that extent the charge was badly drafted.

[14] A badly drafted charge deprives an accused of his fundamental right to raise or prepare his defence. This is more so when the exact time or date and place are essential ingredients of the offence charged. However, in cases where the time, date or place does not constitute an essential ingredient of the offence, mere non-compliance with s. 153 of the CPC on the time, date or place will not vitiate the validity of the charge. As long as the general particulars of the time, date or place are stated in the charge and the exercise of an accused's fundamental right to defend his case is not prejudiced or derogated, the charge remains a valid charge.

[15] In the instant case, the accused was charged with the offence of rape. The meaning of "rape" is explained in s. 375 of the Penal Code; and the relevant part of s. 375 states as follows:

> A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:
>
> (a) …;
>
> (b) …;
>
> (c) …;
>
> (d) …;
>
> (e) …;
>
> (f) …;
>
> (g) with or without her consent, when she is under sixteen years of age.
>
> Explanation – Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

[16] The punishable section for the offence of rape is s. 376(1) of the Penal Code which states as follows:

> Subject to subsections (2), (3) and (4), whoever commits rape shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.

[17] The ingredients for the offence the accused was charged with in the instant case are: (i) there must be sexual intercourse between a man and a woman; penetration is sufficient to constitute sexual intercourse; and (ii) that the victim is under the age of sixteen years of age when the alleged offence

was committed. The exact time or date in the offence charged is not an essential ingredient in order to find conviction against the accused. However, it is to be noted that if the age of the victim at the time or date of the commission of the offence is in question, then it would be relevant to state the exact time or date of the offence was alleged to have committed.

[18] In the instant case, the wordings in the charge were clearly stated. Although the exact time or date for the commission of the offence charged was not stated, in my opinion, the accused's fundamental right to defend the case against him was not prejudiced or derogated.

[19] The Federal Court in the case of *Law Kiat Lang v. PP* [1965] 1 LNS 81; [1966] 1 MLJ 215 referred to and adopted the statement of Atkin J in the case of *R v. Severo Dossi* [1918] 13 Cr App R 158:

> From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the offence.

[20] The above principle was applied in the Federal Court case of *Ho Ming Siang v. PP* [1966] 1 LNS 68; [1966] 1 MLJ 252. The accused in that case was convicted of the charges in consorting with members of the Indonesian armed forces, offences of a firearm and possession of ammunition, which were offences under the then Internal Security Act 1960. The dates stated in one of the charges were wrong, and yet the Federal Court did not find it crucial for the offences charged. See also the cases of *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* [2004] 3 CLJ 737 and *PP v. Chettuvelu Nani* [2007] 9 CLJ 533; [2007] 6 MLJ 621. It is clear from these cases that non-compliance with s. 153(1) of the CPC with regard to the time or date need not necessarily render a charge defective.

[21] Based on the above reasoning, I am of the considered view that the charge is not defective.

Whether A Scientific Officer Is A Qualified Person Under s. 399 Of The CPC?

[22] The above question was traversed in the Court of Appeal decision in the case of *Shahrizal Abdul Ghani v. PP* [2014] 1 CLJ 70; [2014] 1 MLJ 769 (see p. 84 (CLJ); pp. 776-9 (MLJ)). The Court of Appeal held that a scientific officer is a qualified person under s. 399 of the CPC. His Lordship Zawawi Salleh JCA distinguished an earlier decision by the Court of Appeal in the case of *Zulkifli Md Rodzi v. PP* [2013] 4 CLJ 250; [2013] 2 MLJ 348 wherein it was decided otherwise. His Lordship Zawawi Salleh JCA stated as follows:

> We have examined the case of *Zulkifli Mohd Rodzi v. Public Prosecutor* with great care and have found that the court's attention was apparently not drawn to the Gazette Notification PU (B) 224 of 2004. The decision of the court in that case could have been different if the parties had drawn the court's attention to it.

[23] In the instant case, the learned judge has correctly relied on *Shahrizal Abdul Ghani* to come to the decision that P8 was a qualified person under s. 399 of the CPC.

[24] This court was not persuaded by the learned defence counsel's submissions on the above two grounds of appeal.

[25] The ingredients of the offence, as discussed earlier, have been proven by the prosecution beyond reasonable doubt. The credence of the DNA profiling report was not discredited. The DNA profiling report supported the fact that the accused is the paternal parent of the baby boy, in other words, it surmises sexual intercourse took place between the accused and the victim (see *PP lwn. Ismail Ali* [2009] 8 CLJ 46, p. 56 para. 19).

[26] The doctor (SP2) who examined the victim in cross-examination said this:

> Tanpa penetration dan ejaculate inside secara teori boleh, namun saya tiada kes seumpama itu. Dari internet, sperma boleh bergerak, Sperma lelaki. – (see p. 54 of the appeal records)

[27] In gist, what SP2 was saying is that without penetration and ejaculation inside the vagina it may still be possible for a woman to conceive a baby in theory. That statement was made on the assumption that all things are possible. However, taking into consideration all the facts in the instant case, I am of the considered view that it is in the highest degree improbable.

[28] The learned defence counsel had submitted that the medical report (P2), which stated that the victim's last menstrual period was in June 2010, did not corroborate the charge against the accused and further that the victim herself could not confirm the date of the alleged incident and was not firm with her evidence. These submissions, in my considered view, did not cast a doubt in the prosecution case.

[29] Based on the above reasoning, the accused's appeal was dismissed.

On Sentencing

[30] This court is mindful of the principle that an appellate court ought not to interfere the sentence imposed by a trial judge unless it is satisfied that the sentence imposed by the trial judge was manifestly inadequate, insufficient or excessive, illegal, was not the appropriate sentence in view of all the facts disclosed, or that the court had clearly erred in applying the right principle in the evaluation of the sentence. There is a plethora of cases on this proposition; it is unnecessary for me to repeat those cases here.

[31] In the instant case, on the part of sentencing (see pp. 40-41 of the appeal records) the learned judge stated as follows:

> Pembelaan telah membuat mitigasi bahawa OKT baru berumur (23) tahun dan bekerja sebagai tukang kebun di Masjid Bukhari, Alor Setar. Beliau adalah anak ke (3) dari (4) adik beradik. Kedua ibu bapa sudah berusia (50) an dan bapa adalah pesawah. OKT telah insaf dan berjanji tidak akan melakukan lagi.

Saya berpendapat ini adalah kesalahan jenayah OKT yang pertama dan ini bukan kes rogol bawah umur yang membabitkan paksaan dan ugutan. Ini adalah kes yang membabitkan sepasang kekasih dan SP6 berusia bawah (16) tahun ketika kejadian. Demi kepentingan awam dan sebagai iktibar kepada masyarakat dalam membendung gejala seumpama ini saya berpendapat, hukuman penjara (8) tahun dari tarikh tangkap sudah memadai bagi OKT menginsafi kesalahan beliau. Perbicaraan penuh telah dijalankan dan ini membabitkan masa dan kos.

Walaubagaimanapun, OKT masih muda dan perlu kembali kepada pangkuan masyarakat pada masa akan datang sebagai seorang dewasa yang matang dan bertanggungjawap. Adalah diharapkan tempoh hukuman penjara yang dikenakan akan membentuk/rehabilitate beliau sebagai seorang dewasa yang diharapkan. Saya juga berpendapat hukuman rotan adalah tidak perlu memandangkan, tiada sebarang unsur-unsur ugutan dan paksaan dibuktikan dalam kes ini. Saya juga berpendapat dengan keadaan fizikal OKT yang kecil, hukuman rotan hanya akan memudaratkan beliau.

[32] This court noted that the learned judge did not take into account the fact that the victim had given birth to a child as a result of the accused's wrongdoing. This is not the usual statutory rape case where an accused had consensual sex with a victim below 16 years of age. The victim in this case conceived a baby because of the wrongful act of the accused. The court must take cognizance of that fact because it is an important factor when considering what the appropriate sentence is.

[33] I refer to the case of *Hairani Bin Sulong v. PP* [1993] 2 CLJ 79. In that case, His Lordship Richard Malanjum JC (as he then was, now the Chief Judge of Sabah and Sarawak) referred to two English authorities, *R v. Roberts* [1982] 1 All ER 609 and *R v. Billam* [1986] 1 All ER 985 in his judgment. At p. 84 the learned Lordship stated as follows:

In the case of *R v. Roberts* [1982] 1 All ER 609 this is what Lord Lane CJ had to say on the purpose and form of punishment for an offence of rape at page 610:

> Rape is always a serious crime. Other than in wholly exceptional circumstances. It calls for an immediate custodial sentence. This was certainly so in the present case. A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Second to emphasise public disapproval. Third, to serve as a warning to others. Fourth, to punish the offender, and last, but by no means least, to protect women. The length of the sentence will depend on all the circumstances. That is a trite observation, but these in cases of rape vary widely from case to case.
>
> Some of the features which may aggravate the crime are as follows. Where a gun or a knife or some other weapon has been used to frighten or injure the victim. Where the victim sustains serious injury (whether this is mental or physical). Where violence is used

A over and above the violence necessarily involved in the act itself. Where there are threats of a brutal kind. Where the victim has been subjected to further sexual indignities or perversions. Where the victim is very young or elderly. Where the offender is in a position of trust. Where the offender has intruded into the victim's home. Where the victim has been deprived of her liberty for a
B period of time. Where the rape, or succession of rapes, is carried out by a group of men. Where the offender has committed a series of rapes on different women, or indeed on the same woman.

[34] His Lordship in his judgment at p. 85 further stated as follows:

C As to the length of imprisonment to an offender in an offence of rape it is difficult to lay down guidelines. But in the case of *R v. Billam* [1986] 1 All ER 985 again Lord Lane CJ had this to say with regard to the length of sentence in terms of years at page 987:

> The variable factors in cases of rape are so numerous that it is
D difficult to lay down guidelines as to the proper length of sentence in terms of years. That aspect of the problem was not considered in *R v. Roberts*. There are, however, many reported decisions of the Court which give an indication of what current practice ought to be and it may be useful to summarise their general effect.
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> For rape committed by an adult without any aggravating or
E mitigating features, a figure of five years would be taken as the starting point in a contested case. Where a rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position or responsibility towards the victim, or by a person who abducts the victim and holds her
F captive, the starting point should be eight years.
>
> At the top of the scale comes the defendant who has carried out what might be described as a campaign of rape, committing the crime on a number of different women or girls. He represents a more than ordinary danger and a sentence of 15 years or more may
G be appropriate.
>
> Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to woman for an indefinite time, a life sentence will not be inappropriate.
>
H The crime should in any event be treated as aggravated any of the following factors:
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> (1) violence is used over and above the force necessary to commit the rape;
>
> (2) a weapon is used to frighten or wound the victim;
I
> (3) the rape is repeated;
>
> (4) the rape has been carefully planned;

(5) the defendant has previous convictions for rape or other serious offences of a violent or sexual indignities or perversions;

(6) the victim is either very old or very young;

(7) the effect on the victim, whether physical or mental, is of special seriousness. Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point.

The extra distress which giving evidence can cause to a victim means that a plea of guilty, perhaps more so than in other cases, should normally result in some reduction from what would otherwise be the appropriate sentence. The amount of such reduction will of course depend on all the circumstances, including the likelihood of a finding of not guilty had the matter been contested.

The fact that the victim may be considered to have exposed herself to danger by acting imprudently (for instance by accepting a lift in a car from a stranger) is not a mitigating factor; and the victim's previous sexual experience is equally irrelevant. But if the victim has behaved in a manner which was calculated to lead the defendant to believe that she would consent to sexual intercourse, then there should be some mitigation of the sentence. Previous good character is of only minor relevance.

I would add another aggravating factor, that is, likely subsequent negative effect of the offence on the victim psychologically, emotionally and socially in relation to the community she belongs to.

[35] The learned Lordship added one more aggravating factor in the list of the case of *R v. Billam* which is the likely subsequent negative effect of the offence on the victim psychologically, emotionally and socially in relation to the community the victim belongs to. I find that this additional aggravating factor applies in the instant case.

[36] Rape is a serious offence, and one of the main reasons custodial sentence is imposed on a rape case is to protect the women. Special attention has to be given to the subsequent negative effect on the victim. A change in physical and emotion or mental suffering of the victim, or even spiritual distress of the victim has to be considered by the court as this could be an aggravating factor to be taken into account in passing sentence. A negative effect on the victim's emotion or mental suffering need not necessarily take effect immediately, it can befall the victim at a later time. In the instant case, a child was born as a result of the rape, the victim and her family have to bear the burden to bring up the baby. Bringing up a child is no easy task. Along the way, the victim could suffer emotional distress. The victim is still very young and not married.

[37] A young victim who conceives a baby in a statutory rape case not only has to go through the ordeal, including giving evidence in court, she also has to go through the pregnancy period and endure the labour pain as well.

A Young victims are twice more likely to die from pregnancy or childbirth complications than women in the 20s. Teenage pregnancies are considered "high-risk cases". Occasionally, a victim may need to go for abortion under medical advice. Abortion is not always an option for all victims, because abortion is not permissible in certain communities as it is against their
B religious belief.

[38] The Federal Court decision in the case of *Bhandulananda Jayatilake v. PP* [1981] 1 LNS 139; [1982] 1 MLJ 83, at p. 84 held that the court is the guardian of public interest. Hence, the court is compelled to deliver a strong message to the public that the court finds rape offences abhorrent, especially
C so in cases of sex between an offender and a victim below 16 years of age who conceives a baby. Whether there was consent or not is immaterial in a charge of statutory rape. It is said that "even if the girl who is fourteen years of age (in Malaysia 16 years of age), is not "modest" and is a willing party or even if she invited the accused to have sexual intercourse with her, the
D act would still be an offence under this section" (see *State of Kerala v. K Govindan* [1969] Cri LJ 818 (Ker); *Shabir Rashid v. The State* [1969] Cri LJ 1282 (Del)).

[39] A liberal attitude by the court in imposing sentence without due regard to the effects on the victim including the victim's emotional and
E psychological distress of conceiving a baby, or social order and public interest will be counter productive of the societal interest in preventing and reducing social problems, especially the moral delinquency of young people in this country. The court ought to take cognizance of the root cause of these social problems. Based on the above reasoning, a severe punishment ought
F to be meted out in cases where a victim of rape has conceived a baby such as in the instant case. However, if the accused can show to the court that he has taken responsibility for his wrongful action, such as making an offer to take care of the victim and taking full paternal responsibility for the child, these would be useful as mitigating factors for the court to consider a less
G severe punishment to be imposed on the accused.

[40] There is no hard and fast rule on sentencing in rape cases. The Court of Appeal in the case of *Nor Afizal Azizan v. PP* [2012] 6 CLJ 370; [2012] 5 AMR 612 was in favour of not sending young offenders to prison for an offence of statutory rape when there is consensual sex between two underage
H persons. However, this case should not be used as the yardstick to decide cases of similar nature. The Court of Appeal at p. 382 (CLJ); p. 619 (MLJ) stated:

> Each case depends on its own facts and it is neither feasible nor desirable to attempt to lay down any fixed sentence that is meant to govern this
I type of cases. Therefore, these observations made by this court should not be misconstrued as intending to have blanket application or applying to all cases involving young offenders charged with the similar offence as the appellant herein.

[41] Sentences in rape cases diverge greatly. The High Court in the case of *PP v. Azmadi Aznan Dumin* [2012] 1 LNS 9; [2012] 2 AMR 284 ordered the accused to be detained at the Henry Gurney School until he attains the age of 21 years substituting a bind over. The High Court decision in the case of *PP v. Zainuddin Adam* [2012] 1 LNS 543; [2012] AMEJ 0151 held that the sentence of two years imprisonment and one stroke of whipping was considered adequate. The learned High Court was of the view that the accused as the natural father, his welfare must be taken into account and the sooner the child (as a result of the statutory rape) gets to know the accused, the better it is. The High Court decision in the case of *PP v. Mohammad Zhahirin Yusof* [2014] 1 LNS 84; [2014] AMEJ 0245 adopted the approach in the case of *Nor Afizal Azizan*. The High Court decision in the case of *Che Mohd Sufian @ Che Bastian Che Rashid v. PP* [2014] 1 LNS 417; [2014] AMEJ 0524 took into account the psychological ill effects on the victim and public interest and agreed with the sentence of 20 years imprisonment and seven strokes of whipping imposed by the lower court. The High Court decision in the case of *PP v. Ismar Nor bin Tuah* [2014] AMEJ 0416 substituted the sentence of seven years imprisonment and three strokes of whipping with 12 years imprisonment and five strokes of whipping. The Court of Appeal decision in the case of *Nelson Gnanaregasam v. PP* [2010] 3 CLJ 561; [2010] 1 AMR 698 held that the sentence of 12 months imprisonment and five strokes of whipping were not considered as excessive based on the fact that the accused took advantage of the victim's low IQ. The High Court decision in the case of *PP v. Munawar Haris* [2009] 9 CLJ 48 substituted the sentence of seven years imprisonment for each offence charged to run concurrently with nine years imprisonment and two strokes of whipping for each offence charged and upon finished serving the first offence charged only then the sentence for the second and third offence charged shall run concurrently. Each of these cases has its own peculiar facts, and the sentences imposed in these cases depended on their respective facts. The variances in the sentences in these cases confirm that sentencing in rape cases ought not to be rigid but ought to depend on the peculiarity of the facts before the court. Nevertheless, the court should follow the guiding principles for sentencing. The High Court decision in the case of *PP v. Mohammad Arfah Jasmi* [2008] 7 CLJ 836 held that for cases of rape, Parliament has left the discretion entirely to the court as to what sentence is to be imposed save that there must be a minimum sentence of five years which must be imposed and that whipping is only optional in cases of s. 376(2) of the Penal Code.

[42] The High Court in the case of *PP v. Munawar Haris* [2009] 9 CLJ 48, at p. 61 held as follows:

> Masa hadapan mangsa telah dijejaskan akibat perbuatan responden kerana akibat dirogol tiga kali oleh responden, mangsa telah melahirkan seorang anak. Masa hadapan anak mangsa juga terjejas kerana perbuatan responden. Soal cinta-mencintai tidak boleh dijadikan sebagai satu factor mitigasi sama sekali kerana mangsa belum mencapai umur yang

A melayakkannya di sisi undang-undang untuk memberi persetujuan kepada perbuatan persetubuhan di antara mangsa dan responden. Mangsa yang belum berupaya untuk menjaga dirinya sendiri telah melahirkan seorang bayi yang perlu dijaga dan dibela oleh mangsa. Harapan bapa mangsa bahawa mangsa akan dapat berkahwin dengan seorang lelaki yang direstuinya juga hancur kerana perbuatan responden.

B

Adalah penting untuk mahkamah memberi mesej yang jelas kepada responden dalam kes ini dan juga kepada orang-orang yang lain yang ingin mencontohi kelakuan responden dalam rayuan ini bahawa hukuman yang akan dikenakan oleh mahkamah adalah satu yang berat supaya responden dan orang-orang yang lain itu yang bakal melakukan kesalahan
C yang serupa akan didorong untuk tidak melakukan kesalahan yang sama dengan salah anggapan bahawa sekiranya disabit mereka akan menerima hukuman yang ringan semata-mata kerana mangsa telah jatuh cinta kepada perogol dan si perogol bersedia untuk mengahwini mangsa.

[43] The High Court in the above case substituted the sentence of seven
D years imprisonment for each offence charged to run concurrently with nine years imprisonment and two strokes of whipping for each offence charged and after the sentence for the first offence has been served, the sentences for the second and third offences charged shall run concurrently. The learned High Court Judge took into account the subsequent negative effect of the
E offence on the victim and decided that the sentence imposed by the Sessions Court was manifestly inadequate. The learned High Court Judge took cognizance of the fact that a baby was conceived as a result of the wrongful act of the accused, and for that the learned High Court Judge increased the sentences to reflect the seriousness of the subsequent negative effect on the victim as well as her future.

F

[44] In this instant case, the learned Sessions Court Judge did not take into account the subsequent negative effect of the offence on the victim as well as the fact that a baby was born as a result of the accused's wrongful act. The learned Sessions Court Judge had given too much weight to the accused's
G interests. As a result of that, the sentence imposed by the Sessions Court Judge, in my considered view, was inadequate and was not the appropriate sentence in view of all the facts disclosed in the case.

[45] For the reasons stated above, I allowed the prosecution's appeal and set aside the Sessions Court Judge's sentence of eight years imprisonment and
H substituted it with ten years imprisonment and one stroke of whipping.

I